Names

MAY IT PLEASE THE COURT,

MY NAME IS NATHAN ROSEN, AND MY CO-COUNCEL IS ~~FRANK SMITH~~ Ms S Jane Clark,

AND WE REPRESENT JANE MALONEY, PETITIONER,

YOUR HONOURS,

JANE WANTS TO BE A FIREPERSON, FIGHTER

JANE'S FATHER AND BROTHER ~~ARE~~ WERE FIREPERSONS,

JANE HAS APPLIED CONSISTENTLY OVER A 12 YEAR PERIOD TO BE A FIREPERSON.

THE EQUAL RIGHTS AMENDMENT IS PASSED AND CERTIFIED ADOPTED,

AND JANE TRIES ONCE MORE TO BECOME A FIREPERDON,

BUT ONCE AGAIN JANE IS DENIED THE OPPORTUNITY TO TRY OUT FOR THE JOB OF FIREPERSON BY HER SEX.

JANE SUES BUT THE TRIAL COURT FINDS FOR THE CITY,

THE COURT OF APPEALS AFFIRMS BUT THIS COURT GRANTS CERT ON FOUR QUESTIONS.

1. CAN THE VALIDITY OF THE EQUAL RIGHTS AMENDMENT BE DETERMINED IN THIS PROCEEDURE.
2. IS THE EQUAL RIGHTS AMENDMENT VALID.
3. ARE THE EMPLOYMENT PRACTICES OF THE CITY IN VIOLATION OF THE EQUAL RIGHTS AMENDMENT.
4. ~~MAY THE COURT MODIFY THE PREVIOUS ORDER AND INTERFERE WITH THE RELIEF PREVIOUSLY AWARDED BLACK DEFENDANTS, OR IS THERE SOME RULE OF PRIORITY WHICH PROTECTS THE DELIBERATE AND SPEEDY RELIEF GRANTED BLACKS?~~ GRANT Rel. of To Jane that class Repre

I WILL EXAMINE THE FIRST TWO QUESTIONS, AND MY CO-COUNCEL- ~~MR. SMITH~~, Ms Clark WILL PRESENT THE SECOND TWO, and Rebuttal

ROSEN/SMITH

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-55

JANE MALONEY,

individually and on behalf of the class

of all women similarly situated,

Petitioner,

v.

MUNICIPALITY OF LINCOLN,

LINCOLN FIRE DEPARTMENT AND

RESCUE SQUAD, and KENNETH GREER, *et al.*,

individually and on behalf of the class of all persons

similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER,

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CASES

STATUTES

LAW REVIEWS

BOOKS AND TREATISES

MISCELLANEOUS

ORDER AND OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported as *Maloney v. Lincoln*, Civil Appeal No. 79-999, 575 F.2d 390 (1979). The opinion of the United States District Court for the Western District of Tennessee has not yet been reported. The opinion of the District Court, appears in the Transcript of the Record (R. 6-15).

JURISDICTION

The petition for writ of certiorari was granted by this Court on October 8, 1979. Jurisdiction rests on 28 U.S.C. Section 1254 (1) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following constitutional provisions, statutes and rules are relevant to the determination of of present question; U.S. CONST. Article V, 1 U.S.C. sec. 106 (b) (1970); 5 U.S.C. sec. 160 (1940); 28 U.S.C. sec. 1254 (1) (197); 42 U.S.C. sec. 2000e (2) (e) (1974); and 29 C.F.R. sec. 1604.2 (a) (2) (1977).

QUESTIONS PRESENTED

I. Can the validity of the Equal Rights Amendment be determined in this proceeding, or is it a nonjusticiable question?

II. Is the Equal Rights Amendment valid?

III. Are the employment practices of defendant fire department in violation of the Equal Rights Amendment?

IV. May the court modify the previous order and interfere with the relief previously awarded black defendants, or is there some rule of priority which protects the deliberate and speedy relief granted blacks in these circumstances?

STATEMENT OF THE FACTS

Petitioner Jane Maloney is a white female, 30 years old. A resident of Lincoln, Tennessee, she comes from a family of firefighters. Her father died in the line of duty and her brother until a recent layoff has been a fireman with the Memphis Fire Department. Plaintiff Maloney is a licensed practical nurse with specialized training as a emergency medical technician.

On May 1, 1978, plaintiff Maloney applied for a firehouse job in the town of Lincoln, Tennessee. She was found ineligible for said position becuase of her sex and filed a complaint with the Equal Employment Opportunity Commission on May2, 1978. On December 27, 1978, Plaintiff received a right to sue letter under 42 U.S.C. sec. 2000e.

Prior to this, Congress had passed and sent to the States for ratification the Equal Rights Amendment (March 22, 1972). And on September 29, 1978, Congress

passed an extension for the Equal Rights Amendment. And on April 4, 1979, the proud state of Missouri passed. Upon that the General Services Administrator certified adoption of the ERA and published it in the Federal Register.

Directly afterwords, on April 12, 1979, the plaintiff again applied for a firehouse job and was denied because of her gender. On April 18, 1979, she brought suit on two counts, the first under Title VII and the second under the Equal Rights Amendment. She charged the municipality of Lincoln and the Fire Department with sex discrimination on her own behalf and all others similiarly situatied.

Kenneth Greer and other black defendants joined the action as 3rd party defendants to protect the relief granted to that group by a concent corder of the U.S. District Court for the Western District of Tennessee on November 16, 1978.

The case was tried before Judge Farragat on June 13, 1979 with the following issues presented by plaintiff Maloney;1. The Municipality and Fire Department exclude women from eligibility for firehouse jobs,; 2. The Municipality and the Fire Department require that applicants for firehouse jobs meet strength and height requirements, which have the effect of excluding women from eligibility for those jobs; 3. The practice of defendants, Municipality and Fire Department violates the tights of Plaintiff Maloney and those of the class which she seeks

to represent under the Equal Rights Amendment.

The Municipality and Fire Department argued that the Plaintiff, Maloney did not bring her Title VII claim within the 90 days allocted after her right-to-sue letter was issued and therefore was barred. The Judge agreed and dismissed the Count I. The Defendant, Municipality also argued the invalidity of the ERA, although overruled.

The Trial Court ruled for the Defendant, Municipality and Fire Department, denying relief requested by the Plaintiff, Jane Maloney.

Appeal was filed to the United States Court of Appeals for the Sixth Circuit, on June 13, 1979. And on June 21, 1979, that Court affirmed the lower court decision.

This case is before this Court by a writ of certiorari granted October 8, 1979.

SUMMARY OF ARGUMENT

I

The validity of the Equal Rights Amendment (ERA) can not be determined in this proceeding, for it is nonjusticiable, becuase it is either certified as valid and final by the General Services Administrator as was done historicly by the Secretary of State, or the Question is a Political one only for Congressional determination. In analizing either possible test of the Political Question doctrine, the ERA question is a political one, which the Court should not interfer with.

II

If the Court determined to reach the substantive issues, it will find that the Equal Rights Amendment did pass within the required time limit as set forth within the Amendment extension. The Congressional extension of time for ratification is effective, because the question is one for Congress in which a simply majority is required. The time extension was valid when compared to the Supeme Court test. While prior rejections of the ERA, before ratification does not effect the validity of the ratification. The ratification of California was effective, while attempts by states to recind their ratifications were not effective. This is because the states have no power to recind or that they are conditional ratifications therefore being invalid. An examination into precedent finds support for the ineffectiveness of recisions, whether it be commentators, Courts, Congress or parlimentary procedure.

III

The practices of defendant fire department are in violation of the Equal Rights Amendment. These practices fail to qualify under the bona fide occupational qualification exception or otherwise justify the exclusion of women from employment as firefighters. Respondent has also failed to justify its height requirement or to show it reasonably necessary to the function of firefighting.

IV

The Court can, in equity, modify the previous order. The needs of both blacks and women canbe met in concert through the employment of black female firefighters in numbers proportionate to their presence in Lincoln, Tennessee. Such individuals will meet the requirements of both groups before this court.

ARGUMENT

I. THE VALIDITY OF THE EQUAL RIGHTS AMENDMENT CAN NOT BE DETERMINED IN THIS PROCEEDING, FOR IT IS NONJUSTICIABLE, BECAUSE EITHER CERTIFICATION BY THE SECRETARY OF STATE IS FINAL OR THE QUESTION IS A POLITICAL ONE ONLY FOR CONGRESS.

A. CERTIFICATION BY THE SECRETARY OF STATE IS FINAL.

The Secretary of State initially, and now the General Services Administrator has been authorized to determine when and certify the passage of Constitutitonal Amendments. 1 U.S.C. sec. 106 (b) (1970) *amending* 5 U.S.C. sec. 160 (1940).

The General Services Administrator acting prusuant to this authority did certify the passage of the ERA. Record at 6.

Certification by the General Services Administrator as was with the Secretary of State in final and conclusive.

> The proclamation by the Secretary of State certified that, from official documents on file in the Department of State, it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States". As the legislatures of Tennessee and West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive on him, and being certified to by his proclamation, is conclusive upon the courts." *Leser v. Garnett*, 258 U.S. 130, 137 (1921).

Therefore this Court should apply the certification and determine that the question of the ERA's validity is non-justiciable and cannot be determined in this proceedings.

B. QUESTION IS A POLITICAL ONE ONLY FOR CONGRESS.

> In forming the constitutions of the different states, after the Declaration of Independence, and in various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified, or not by the people of the State, and judicial power has followed it decision. *Luther v. Borden,* 48 U.S. (7 How) 1, 39 (1849).

> Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point. *Coleman v. Miller,* 307 U.S. 432, 459 (1938) (Black, Roberts, Frankfurter and Douglas, concure).

There is nothing for this court to determine. The passage of the Constitutional Amendment was certified and Congress has the power to control the process. There is no place for the courts here.

At different times during the development of judicial review, two different tests were announced. The *Coleman v. Miller* and the *Baker v. Carr* test of political question doctrine.

In *Coleman v. Miller*, 307 U.S. 432, 454-55 (1938), the Supreme Court sets down a test for Judicial review. "In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

In attempting to establish finality, certification is an appropriate place to be. The court in *Coleman v. Miller* did find that certification prevent the case form becoming a judicial one.

A second, but much more complex test of the political question doctrine is found in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Many reams have been written determining whether or not the question of the ERA's ratification applys within one of these catagories. There are no binding precident and ultimately the decision is a matter of judicial activism. The arguments span the horizon from that Congress is given the power to pass Constitutional Amendments, to we already have a final verdict by the General Services Administrator to what standards to gauge acceptence other than the people's representative-Congress. But the bottom line is whether the members of this court want to embroil themselves in this controversy, comming out as playing like God, telling the people from on high whether what they did was effective.

II. THE EQUAL RIGHTS AMENDMENT IS VALID.

A. THE EQUAL RIGHTS AMENDMENT DID PASS WITHIN THE REQUIRED TIME LIMIT AS SET FORTH IN THE AMENDMENT EXTENTION.

Thirty-Nine states ratified the Equal Rights Amendment. The Record, App. at 28-29. Which was certified by the General Services Administrator as properly passed. The Record at 8. Therefore the ERA did effectively pass and became part of the Constitution.

B. THE CONGRESSIONAL EXTENSION OF TIME FOR RATIFICATION IS EFFECTIVE.

(1) EXTENSION OF TIME IS A CONGRESSIONAL DECISION.

"This court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress." *United States v. Sprague*, 282 U.S. 716, 732 (1930). Congress has the power to determine how the Amendment need be ratified. The period for ratification by the States is part of that power. The Supreme Court made this point clear when saying in *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921) that the period of ratification is "a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification."

Congress has basically three choices as to time limits. They can submit an amendment to the states with no indication of a time limit (as was done with the first 18 17 amendments and the 19th), or Congress could make a time limit as part of the text of the Constitutional Amendment (as was done with the 18th Amendment and the 20th, 21st and 22nd). Congress has a third

alternative, a middle ground which would be specify a time in the resolution clause before the Constitutional Amendment (as was done with the 23rd and 24th Amendment).

Congress choose the middle alternative by passing in the Resolution clause a time limit. H.R. J. Res 208, 92d Cong., 2d Sess., 118 Cong. Rec. 4612 (1972), *reprinted in* Record, App. at 17.

By Congress choosing this alternative, they are not "hobbling" themselves as to changing their mind. They did not frame the time limit as a fixed an integral part of the amendment text, but left it a procedureal detail for Congress. *Equal Rights Amendment Extension: Hearings on H.J. Res 638 before the Subcommittee on Civil and Constitutional Rights*, 95th Cong., ist & 2nd Sess. 121 (1978) (statement of Ruth Bader Ginsburg).

Some opponents of the ERA argue that states had relied upon the time limit in the resolution clause. This would seem improbably becuase the resolution clause is not designed for state ratification becuase inaddition to the time specified in the resolution clause, the other information their is recitation of part of article V and the mode of ratification, matters in which the State Legislatures have no power over.

Putting theory aside, on a practical level, their exists no evidence that states relied upon the seven year time. Robert J. Lipshutz, Counsel for the President in examining all the state ratifications could not find any reliance. R.J. LIPSHUTZ, *Constitutionality of Extending the Time Period for Ratification*

of the Proposed Equal Rights Amendment 48-49 (1977).

If states did attempt to rely upon the seven year time limit, then it would be that the State Legislature conditionally ratified, which is invalid. *See, Letter from James Madison to Alexander Hamilton, and discussion found on Page , point II, D. 2.*

It would seem unique if this Court determined that Congress be bound by the time limitation found in the resolution clause, when this court in *Rhode Island v. Palmer*, 253 U.S. 350 (1919), known as the *National Prohibition Cases*, did not even mention the time limit incorpated into the text of the 18th amendment. The Court in analysing the validity of the amendment, every time recites what the amendment states, excludes the time limit.

(2) CONGRESSIONAL ACTION REQUIRES SIMPLE MAJORITY VOTE.

"The voice of the majority decides; for the res majoris partis is the law of all councils, elections, etc., where not otherwise expressly provided." T. JEFFERSON, *Manual of Parlimentary Practice*, sec. XLI, *reprinted in* H. Doc. No. 416, 93d Cong., 2nd Sess., sec. 508, at 257 (1975).

The Constitution specifies when a super-majority is required; Approval of treaties-Article 2, sec. 2; Impeachment-Article 1, sec. 3; Expel member-Article 1, sec. 5; Override Veto-Article 1, sec. 7; Removal of disability-14th Amendment, sec. 3; and Presidential resumption-25th Amendment.

Procedural detail are handled by a simple majority. When more is required, it is specified as with the requirement to

"propose" constitutional amendments in Article V. The Congress proposed the ERA by the supermajority required and acted within procedural majority requirements for the time extension.

C. ERA EXTENSION TIME IS VALID AS SET FORTH BY THE SUPREME COURT.

The Supreme Court has in *Dillon v. Gloss*, 256 U.S. 368 (1921) has established the "sufficiently contemporaneous" test, in which the court looks to whether the passage was within a "reasonable" time. The Court there contended that Congress, NOT the Courts determine whether a reasonable time for passage was set. The Court thereafter in dicta indicated that seven years was reasonable. How now is seven years, two weeks not reasonable. Consider how much discussion, debate and analysis has been done all during this period, one would hardly call the ERA a stall amendment, it is very alive. Considering the history of our country, it only took about 100 years for women to get the right to vote and another 100 for "equal rights", the time for passage was reasonable.

D. PRIOR REJECTION OF ERA, BEFORE RATIFICATION DOES NOT EFFECT THE VALIDITY OF THE RATIFICATION.

"The practice of disregarding prior refusals to ratify is now so well accepted that it no longer stirs any controversy. Neither proponents nor opponents of the Equal Rights Amendment treat rejection as final." Rhodes & Mabile, *Ratification*

of Proposed Federal Constitutional Amendments-The States May Rescind, 45 TENN. L. REV. 703, 710 (1978).

History is replete with examples of this basic principle. In both the 13th Amendment and the 16th Amendment, a States initial rejection of a Constitutional amendment did not effect the validity of a States latter ratification. R.J. LIPSHULTZ, *Constitutionality of Extending the Time Period for Ratification of the Equal Rights Amendment* 32-33 (1977).

Therefore, although some states decided at first examination not to pass the ERA, when they did ratify effectively, their action was valid.

E. CALIFORNIA'S RATIFICATION OF ERA IS EFFECTIVE.

California ratified the ERA on April 3, 1979 (R. at 8) and was certified valid by the General Services Administrator thereafter. Therefore California's ratification is effective.

This Court can decide not to even have to deal with this question because even if California's ratification is not effective, the ERA is still valid becuase it has 38 other state ratifications (38 being the required number). The Supreme Court might also determine that any attack on the California State Legislature's action ought to be brought in California rather than here.

But if the Supeme Court would want to reach the substantive issues, they will find that California's action will be substanted as valid.

The procedure for ratification is wholly governed by federal Constitutional law. Ratifing a proposed constitutional

amendment "is a federal function" and "transcends any limitations sought to be imposed by the people of a state". *Leser v. Garnett,* 258 U.S. 130, 137 (1921).

State Legislatures are not acting within their normal legislative function and regular rules of procedure are not relevant. *See, Hawke v. Smith,* 253 U.S. 221, 229 (1919); *In re Opinion of the Justices,* 118 Me. 544, 107 A. 673, 674 (1919).

The effect of ratification being a federal function and the legislators not acting in their normal roles, is that initive and referendum are not binding.

> It admits of no doubt that in the matter of amendment which is governed by article five, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions." *In re Opinion of the Justices,* 118 Me. 544, 107 A. 673, 675 (1919) (emphasis added).

Commentators have concluded that the "power over amendments had been completely and unreservedly lodged" with the State Legislature and it has been "definitely settled that the states have no authority to permit the people to participate". L.B. ORFIELD, *The Amending of the Federal Constitution* 69 (1942).

Even if the initive and referendum was allowed, the result was action which would have amounted to a conditional ratification. Conditional ratifications are not allowed, *See brief on page , point II, D. 2,* and so the condition that the initive and referendum attempted to impose is null and void and can be ignored.

But if this Court would want to ignore all the above arguments, California's ratification is still effective because procedural irregularities are not lethal as long as followed federal procedure. *Leser v. Garnett*, 258 U.S. 130 (1922); Orfield, *The Procedure of the Federal Amending Power*, 25 ILL. L. REV. 418, 434 (1930).

Numerous Federal cases apply this principle to hold an action valid although violative of state procedure. *See, West Virginia ex rel Dyer v. Sims*, 341 U.S. 22 (1950); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954); *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971); and *Omaha Tribe of Nebraska v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971).

The conclusion has to be that California's ratification is effective, either based upon certification, judicial non-reviewability, proper ratification following federal procedure or conditional ratification.

F. ATTEMPTS BY STATES TO RECIND THEIR RATIFICATIONS ARE NOT EFFECTIVE.

(1) STATES HAVE NO POWER TO RECIND THEIR RATIFICATION.

"(I)f a state legislature has once ratified a federal amendment a subsequent Legislature has no power to rescind such ratification." *In re Opinion of the Justices*, 118 Me. 544, 107 A. 673, 675 (1919). This is true whether it is the same legislature trying to recind. "(w)here a state has once ratified an amendment it has no power thereafter to

withdraw such ratification." *Coleman v. Miller*, 146 Kan. 390, 71 P.2d 518, 526 (1937).

Raymond M. Planell updates the law on this question, when he says that, "The law to date convincingly rejects any power within the states to rescind prior ratification..." Note, *The Equal Rights Amendment: Will States be allowed to Change their Minds?*, 49 NOTRE DAME LAW. 657, 657-58 (1974).

J. William Heckman, the counsel of the Subcommittee on Constitutional Amendments of the United States Senate echos that "once a State has exercised its ownly power under Article V of the United States Constitution and ratified an amendment thereto, it has exhausted such power and any attempt subsequently to rescind such ratification is null and void." Note, *Reversals In the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L. J. 147, 154 (1973).

(2) RECISIONS ARE NOT EFFECTIVE BECUASE THEY ARE CONDITIONAL RATIFICATIONS.

Conditional ratifications of Constitutional amendments are not allowed. In the historical words of James Madison to Alexander Hamilton, they come down to us.

> The Constitution requires an adoption in toto and for ever. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must viciate the ratification. *Reprinted in Equal Rights Amendment Extension: Hearings on H.J. Res 638 before the Subcommittee on Civil and Constitutional Rights*, 95th Cong., 1st & 2nd Sess. 19 (1978).

Thomas I. Emerson, Professor of Law at Yale Law School provides the conection between the impermissible conditional ratification and recissions.

> (r)ecission is not allowable; that rescissions is a conditional ratification. It imposes a ratification based upon a condition of time, that a certain amount of time the ratification can be changed. And I think the constitutional amendment process as has been clear from James Madison on, does not contemplate a conditional ratification. I think, therefore, that it is unconstitutional for a State to rescind. *Equal Rights Amendment Extension:Hearings on H.J. Res 638 before the Subcommittee on Civil and Constitutional Rights*, 95th Cong., 1st & 2nd Sess. 67 (1978).

The conclusion drawn is that there is a conditional ratification, which prevents states from recinding. Which is the second reason why attempts by states to recind their ratifications are not effective.

(3) PRECEDENT SUPPORTS THE INEFFECTIVENESS OF RECISIONS.

There are many levels of precedent which support the ineffectiveness of recisions. The first level is commentators, the next is Court decisions, the third is previous amendments history, the next is congressional attitude, then state attitude and last by comparing recisions as found in Parlimentary procedure.

Senator Davis on January 22, 1870 summed up what the attitude was then, when he said, "When the ratification is made it can never be retracted." CONG. GLOBE, 41st Cong., 2nd Sess. 1479 (1870).

"Congress did, therefore, express itself rather clearly on these questions. It concluded as had most of the commentators, that a state could reverse any action rejecting ratification but once it had acted favorably, its power expired." Heckman, *Ratification of a Constitutional Amendment: Can a State change its mind?*, 6 CONN. L. REV. 28,33 (1973).

Some commentators contend that although recisions are not legally binding, they have heavy persuasive effect. Professor Lawrence H. Tribe of Harvard Law School makes this point clear.

> The power to rescind is the power on the part of a State to advise the Congress that, in determining whether an amendment has been validly ratified, the State is no longer in favor of the amendment; how congress treats that action by the most recent legislature is a matter of delicate congressional judgement, depending on a wide variety of facts and circumstances in each state." *Equal Rights Amendment Extension: Hearings on H.J. Res 638 before the Subcommittee on Civil and Constitutional Rights*, 95th Cong., 1st & 2nd Sess. 45 (1978).

In these same hearings, John M. Harmon, the Assistant Attorney General in the Office of Legal Counsel in the Department of Justice on page 6 states that, "Congress cannot give to the States a right to rescind by any means short of amending Article V of the Constitution."

Therefore, Senators and commentators are in agreement that recisions are ineffective and although they might be persuasive, it would take a constitutional change to allow them effect.

The Supreme Court has declared that ratification is final and not subject to recisions. "It is generally agreed by lawyers, statesman and publicists who have debated this question that a state legislature which has rejected an amendment proposed by Congress may later reconsider its action and give its approval, but that a ratification once given cannot be withdrawn." *Coleman v. Miller,* 146 Kan. 390, 400, 71 P.2d 518 *affirmed* 307 U.S. 432 (1938); *In re Opinion of the Justices,* 118 Me. 544, 107 A. 673 *affirmed sub nom Hawke v. Smith,* 253 U.S. 221 (1919).

In addition to Court decisions supporting the ineffectiveness of recisions, previous amendment's history makes this point. This is true with the events surrounding the passage of the 13th, 14th, 15th and 19th Amendment. In these examples, states attempted to recind after they had ratified. "(t)he courts have upheld the finality of states ratification", Note, *The Equal Rights Amendment: Will States be allowed to change their Minds?,* 49 NOTRE DAME LAW. 657, 658 (1974);*See,* Heckman, *Ratification of a Constitutional Amendment: Can a State change its mind?,* 6 CONN. L. REV. 28, 33 (1973); *See generally,* Dycus, *ERA,* 38 THE CHART 10, 12 (Sept. 10, 1976).

These historical precedents mandate the ineffectiveness of recisions. Some commentators argue that in some of the above cases, the state which recinded was not critical to the passage of that particular amendment. Even if this is

sometimes true, this does not make the congressional determination academic. The congressional resolution and not accepting recisions are critical becuase congress did not officially know that other states had ratified. *Equal Rights Amendment Extension: Hearings on H.J. Res 638 before the Subcommittee on Civil and Constitutional Rights,* 95th Cong., 1st & 2nd Sess. 21 (1978) (Robert Lipshutz).

Congress has considered the question of whether a state can recind ratification of a constitional amendment. After the controversy around the 19th amendment, two senators Wadsworth of New York and Garrett of Tennessee very strongly supported recisions and realized that recisions were ineffective , so proposed a amendment to Article V to allow recisions.

> It is apparent that under Article V, as now drawn, no state can change its vote from affirmative to the negative in the matter of a constitutional amendment. Once ratified by a State, that State cannot change, even though it does so before a sufficient number of States have ratified so as to insert the amendment in the Constitution itself. Tennessee tried to change. It cannot be done under Article V. 65 CONG. REC 4492 (1924).

Congress is aware that once a State has ratified they may not recind the effectiveness of that ratification. Some oppose that but none have been able to change it.

One possible reason for this might be found in H. ROBERT, *Roberts Rules of Order, Revised* 169-70 (1971), "The motion to rescind can be applied to votes...except; votes cannot be rescinded after something has been done as a result of that

vote that the assembly cannot undo; or when it is in the nature of a contract, and the other party is informed of the fact..."

Congress is aware that based upon a state's ratification, other states might ratify which would lock the earlier state in. Or the analogy to a contract of interstate compact, where by one state's passage, the other states act based upon the effect of that collective action.

Irregardless of the theory used, attempts by states to recind their ratifications are not effective, be it because that the States have no power to recind, or that recisions are invalid based upon them being conditional ratifications or that precedent mandates the ineffectiveness of recisions.

Before reaching that question, the Court found that California's ratification of the ERA was effective and that prior rejections of the ERA, when they occured before ratification does not effect the validity of the ratification.

The Court if required to reach the question of the validity of passage of the ERA, found that the ERA did pass within the time required as set forth in the Amendment Extension. The extension, which is a decision wholly in Congress's territory, was effectively enacted by simple majority vote. Without reliance upon the time limit, which was within the Supreme Court reasonableness test.

But the Court never had to reach all the above issues, because they simply could determine the question was a political one only for Congress or that certification was final.

III. THE PRACTICES OF DEFENDANT FIRE DEPARTMENT ARE IN VIOLATION OF THE ERA.

The purpose of the ERA was to eradicate all unfair treatment and practices based on sex. It is not difficult to see how defendant fire department's practices are in violation of the Equal Rights Amendment when one looks to the intent of the amendment. An excellent discussion of the ERA appears at 80 YALE L.J. 871 (1971). A summary of discussion ther says,

> "We believe the Equal Rights Amendment, broadly construed....furnishes a viable structure for achieving equality of rights for women. The basic proposition--that differences in treatment under the law shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation--is founded in the fundamental values of our society....As a matter of constitutional mechanics, therefore, the law must start from the propositon that all differentiation is prohibited.

If the intent of the amendment is clearly expressed here, and it apparently is, then no differentiation based on sex in employment can escape scrutiny under the ERA. Although defendant fire department may not have been in violation of prior law, the ERA brought under its control all discrimination of whatever form that is based on sex. It is the Congressional extention of Frontiero, where sex was first viewed as a suspect classification. Frontiero v. Richardson, 411 U.S. 677 (1973). The ERA has effectively made sex a suspect classification and subject to the same scrutiny as race. It is not unreasonable, therefore to view the practices of defendant fire department in violation

of the ERA.

A. Sex Does Not Qualify As a Bona Fide Occupational Qualification For Firehouse Positions.

The only situation in which sex can be considered for employment and escape scrutiny under the ERA might be when it is a bona fide occupational qualification. Examples might wet nurses, sperm donors and the like. Only when sex is essential to the scheme of a job, that it, the sex of the employee must be either male or female because the other sex is physically incapable of performing the tasks at hand, is sexual consideration allowed in employment. 42 U.S.C. § 2000e-2. The courts have seldom granted a bona fide occupational qualification (BFOQ). In Rosenfield v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), the court said that sexual characteristics rather than characteristics the might, to one degree or another, correlate with a particular sex must be the basis for application of an exception to Title VII of the Civil Rights Act of 1964 when sex is a bana fide occupational qualification. Although nothing appears in writing about bona fide occupational qualifications and the ERA at this time, it is reasonable to assume that the same or similar standards must apply. Defendant fire department has arbitrary height and strength standards which have effectibely precluded most women from working as firefighters in Lincoln Tennessee.

These standards do not accurately measure one's ability to function as a firefighter, yet they are the basis on which

firemen have been selected in Lincoln, Tennessee. Such "tests" discriminate dispprcportionately against women who generally have smaller frames than men, and should be eliminated or altered to reflect one's actual ability to fight fires. It has been decided that where standards of physical strength are not applied uniformly to men and women, an employer may be guilty of sex discrimination. Batkyo v. Pennsylvania Liquor Control Bd., 459 F.Supp. (W.D. Pa. 1978). In this instance, women are not ever allowed to try to meet the standard. They are summarily dismissed as not being qualified because of their sex. This is sex discrimination in its worst form. Another case, Long v. Sapp, 502 F.2d 34 (5th Cir. 1974), compells a narrow interpretation of the exception provided by state statute to those few situations where sex is a bona fide occupational qualification. Long also places the burden upon the employer to show that there is a factual basis for believing that all or substantially all women are unable to so a job. The defendant fire department has failed to meed that burden and should be estopped from using or attempting to use sex as a BFOQ. There is no reason to believe that women as a group are incapable of handling the demands of the job of firefighter. Although it may be true tht some or even a substantial number cannot meet all the demands imposed by defendant fire department, by no means does this indicate that no women can safely perform the tasks. Such decisions should be made on an individual basis, and not on the basis of

stereotypes or popular beliefs about a sex or group. This type of fallacious thinking is not condoned by the courts and is specifically addressed in Los Angeles Dept of W. & P. v. Manhart, __U.S.__, 55 L.Ed 657 (1978), where the court says that we must look to individual abilities and differences and not to assumptions about the abilities of one sex or ethnic group in making assessments of abilities. Purely habitual assumptions about a woman's inability to perform certain kinds of work are not acceptable reasons for refusing to employ qualified individuals. Los Angeles, supra.

1. Height and strength requirements of defendant fire department, although neutral on their face have discriminatory impact on women, and are therefore violative of the ERA.

A procedure, though neutral on its face, may have very detrimental effects on women or minority groups, and is therefore in violation of the Title VII of The Civil Rights Act of 1964 and/or The Equal Rights Amendment. Penn v. Stumpf, 308 F.Supp. 1238 (N.D. Ca. 1970). In Penn v. Stumpf, supra, injunctive relief was allowed where a black male who applied to the Oakland Civil Service Board of Commissioners for an appointment to a position as an officer with the Oakland Police Department. The steps included taking a thirty minutewritten "Mental Ability"test, a two hour written "General Knowledge" test, a psychiatric test, an "Oral Examination" and a "Backgroun Investigation". Penn, supra . Penn took but failed the written test, and was allowed to complete the remainder of the testing procedure. Plaintiff brought this action on behalf of himself and all others

similarly situated, charging the test discriminatory and the Oakland Police Department hiring practices violative of due process of law and equal protection of the law. On attempt to dismiss by the Department, motion was denied. In the instant case, defendant fire department's height and strength requirements must be found violative of the Equal Rights Amendment and not to constitute a bona fide occupational qualification for the male sex. The requirements may not be intended to be discriminatory, but their effect like those in Penn, supra, eliminate too great a number of females from the potential job pool for firehouse positions in Lincoln, Tennessee.

The Department has shown no rational reason for its height requirement. In order for the requirement to stand there must be a valid job related reason for it which outweigh its discriminatory impact. Smith v. City of East Cleveland 363 F.Supp. 1131 (N.D. Ohio 1973). In Smith the court said that a requirement producing a largely disparate effect on a given group is constitutionally impermissible if not rationally related to job performance. No such showing has been made in the present action. Plaintiff is entitled to an on-the-job tryout to determine her fitness irrespective of the height requirment.

Strength requirements of defendant fire department, though neutral on their face, have adverse discriminatory impact on women and are therefore discriminatory. The job of firefighter has been called strenous and this has

served as justification to exclude women from such positions. The impact of this reasoning has been far-reaching with devastating effects on women in this country. Labeling a job as strenous however, does not meet the burden of showing that it is within the purvue of the bona fide occupational qualification exception. Weeks v. Southern-Bell Telephone &Telegraph Co.,408 F.2d 228 (5th Cir. 1969) granted relief to a female plaintiff who was discriminated against in applying for a switchman's job with the telephone and telegraph company. The company's justification was that the job was too strenous for a woman and it sought to use sex as a bona fide occupational qualification. The court disallowed the BFOQ and found that the company discriminated against women in their assumptions about frmale abilities. In relying on the BFOQ exception to Title VII of the Civil Rights Act of 1964, the company had the burden of showing that they had reasonable cause to believe that all or substantially all women would be unable to safely perform the duties of the job involved. This they failed to do. Plaintiff in this action, has presented no evidence to show that most or all of the class of women are unable tomeet its strength requirements or that these requirements are so essentially job related as to justify their retention irrespective of their detrimental on women in the job market of Lincoln, Tennessee. There is no justifiable reason to allow the retention of these requirements.

2. The practice of excluding women from firehouse positions in Lincoln Tenn. is not justified by business necessity.

Defendant fire department has cited several reasons why it does not employ women that might appear to be based in business necessity. The first is lack of separate accomodations for women in the firehouses. This justification must not be allowed to stand lest at every turn women are faced with fiscal restraint as a justification for discrimination. Expense for separate facilities does not support a bona fide occupational exception unless the expense is clearly unreasonable. 29 C.F.R. § 1604.1(a)(1)(iv)(1970). Although the construction of new firehouses may seem unreasonable at present, when viewed prospectively, it is an inevitable consequence of the passing of time. The present facilities of no fire department can last for eternity, and those in Lincoln will have to be expanded or replaced. The argument that there is no more municipal land available defeats itself. For this is a sign of growth and growth begets a need for additional community services. There are few if any municipalities in the country which are not facing fiscal problems at this time. If this argument is accepted women will be told to "hurry up and wait" for what has been denied them historically; equality. I offer that this is untenable and that such arguments must be viewed for what they are. That is, these are nothing more than last ditch, stop gap measures designed to frustrate the intent of the Equal Rights Amendment, and to relegate women further to

a position of second-class citizenship. In Officers For Justice v. San Francisco, 395 F. Supp. 378 (N.D. Ca. 1975) defendant civil service commission was charged with administering a physical agility test that had a discriminatory effect on Asians, Latins, and females. It was further charge with imposing height standards which effectively precluded the acceptance of these individuals for employ ment. Their defense was that the test and height standards were reasonably related to the job so as to justify their retention. The court held that there had been no evidence of an attempt to find acceptable alternative practices which could accomplish the same purposes with lesser adverse impact on females. Officers For Justice, supra. This constituted an attempt to justify practices out of business necessity and was not accepted by the court. In the instant case, there has been no attempt whatsoever to alter the conditins in the firehouses to accomodate women firefighters. Nor have there been any attempts to develop truly job related tests which are not contigent on physical strength to determine one's suitability for the position of firefighter. Until such meaningful attempts are made, the Lincoln Fire Department and Rescue Squad will not be in compliance with the intent of the Equal Rights Amendment. It matters not that intent to discriminate is lacking, Gibson v. Local 40, Supercargoes &Checkers, Etc. 543 F.2d 1259 (9th Cir. 1976). What is critical is the discriminatory impact. As long as the impact is present, the practice cannot stand.

An employer cannot rely on his subjective expertiste in in attempting to show that criteria which discriminate are necessary or related to job performance. Boston Chapter, NAACP,Inc v. Beecher 371 F.Supp. 507 (D.C. Mass. 1974). This case involved the testing and hiring practices of the Boston Fire Department. Those practices were found not sufficiently job related or indicative of applicant's future performance to allow retention. The city was ordered to cease using the discriminatory examinations, establish new eligibility lists on the basis of valid qualifications, and to hire one minority member for each white person until the complement of minorities on fire departments was commensuratewith the percentage of minorities in the communities. Such relief was fair and equitable, and should be applied in the case at bench. Plaintiff Maloney is a licensed practical nurse and an emergency medical technician capable of dealing with any medical emergeny on the scene of a fire. She also comes from a family with a history of both interest and participation in firefighting, her father having died in the line of duty. With her training and enthusiasm she can bring new ideas to what might otherwise become a stagnant institution resistent to change which MUST come(emphasis added).To deny Jane Maloney relief as requested would render the Equal Rights Amendment of no practical impact and frustrate its very purpose. It would also deny the people of Lincoln, Tennessee the services of a truly competent and dedicated firefighter. The Court is asked to grant the relief requested.

IV. THE COURT MAY MODIFY THE PREVIOUS ORDER AND ALTER THE RELIEF PREVIOUSLY AWARDED BLACK DEFENDANTS WITHOUT VIOLATING ANY RULE OF PRIORITY PROTECTING THE DELIBERATE AND SPEEDY RELIEF GRANTED BLACKS IN THESE CIRCUMSTANCES.

A. With The Passage Of The ERA, Sex, Like Race Has Become A Suspect Classification.

Sex was first viewed as a suspect classification in Frontiero v. Richardson, 411 U.S. 677 (1973). In that case, three justices held it to be inherently suspect subject to the strict judicial scrutiny received by race, alienage or national origin. Four justices concurred in the resulting judgment. The ERA has taken full cognizance of the suspect classification of sex and was passed with that intent in mind. When addressing the Equal Rights Amendment as early as 1971, Barbara a Brown said,"As a matter of constitutional mechanics, ...the law must start from the proposition that all differ-- entiation is prohibited." It would make little sense to even have the Equal Rights Amendment if it failed to change the status of women in our society. The ERA has done for women what the Thirteenth Amendment has done for blacks, and rightly so. It has freed them and provided equality that has long been denied. Like any group freed from bondage by Congressional mandate, this one needs and must surely be granted special cognizance and protection in its new position. Without this special protection, nothing has changed. This surely cannot have been the intent of Congress, being fully aware of the Frontiero decision and the need for special safeguards to assure that the amendment take full effect. Sex therefore, like race, must be a suspect classification.

B. In Equity, The Court Has Both The Power and The Duty To Modify The Previous Order and Alter The Relief Previously Awarded Black Defendants.

The question before the Court is one of equity. When such a question arises, the Court has a great deal of latitude in shaping remedies, and is expected to exercise those "qualities of mercy and practicality (that) have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321 (1944). Equity can move its hand to alter the previous judgment and create a new remedy for blacks while fashioning a viable and effective remedy for women at the same time. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to thenecessities of the partibular case." Hecht, supra. The Court has sought, in the past to recreate conditions that would have been had no unlawful discrimination existed. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Had there been no such discrimination in this case, women could have had approximately 50% of the firehouse jobs that presently exist. It is only fair, therefore, to grant the relief petitioner prays for. The task of this Court and theguidelines to follow are adequately set forth in Teamsters v. United States, 431 U.S. 324 (1977) where the Court previously said,"The courts must look to the practical realities and necessities inescapably involved in reconciling competing interests, in order to determine the 'special blend of what

is necessary, what is fair, and what is workable." Teamsters recommends that balance which is fair to all. In this instance the Court can modify the previous order by requiring that a percentage of black females be employed as firefighters, satisfying both the black and the female goals.

CONCLUSION

WHEREFORE, Petitioners respectfully request this Court reverse the decision of the United States Court of Apeals for the Sixth Circuit, and to hold the Rule as promulgated unlawful and set it aside, or to remand with instructions to modify in a fair and equitable manner.